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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 22.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY,
Petitioner,

vs.

WINNIE BURTON.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR THE RESPONDENT.

W. GWYNN GARDINER,
GEORGE A. MADDOX,
Attorneys for the Respondent.

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BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

The respondent sued in the Municipal Court of the District of Columbia upon a policy of insurance issued on December 12, 1927, to and upon the life of respondent's husband, in which policy respondent was named beneficiary. The amount claimed was $372.00, with interest from May 22, 1929, the date of the death of the insured. (R. p. 1.)

There was a written application made by the insured but a copy of same was not attached to and delivered to the insured with the policy. (R. p. 6.)

At the trial in the Municipal Court of the District of Columbia, the plaintiff offered in evidence the policy of insurance, the premium receipt books showing payments of all premiums due the insurer from the date of the policy until the death of the insured, and put in evidence the certificate of death and the attending physician's certificate of death and stated to the court with the assent of counsel for the defendant insurer that there was no controversy between the plaintiff and defendant as to the fact of death and that the insurer had declined to pay to the plaintiff the $372, amount provided by the terms of the policy. (R. pp. 5, 6.) The plaintiff also introduced evidence showing that the policy was issued in the District of Columbia and delivered in said District to the insured, and all premiums were paid in the District of Columbia. Thereupon the plaintiff rested.

The policy contained a provision that if the insured was not "in sound health" on the date of the policy, then in such case the insurer might declare the policy void and the liability of the Company in the case of such declaration or in case of any claim under the policy, should be limited to the return of the premiums paid on the policy, except in the case of fraud in which case all premiums would be forfeited to the Company.

There was also a provision in the policy that in case the age of the insured was misstated, the amount payable under the policy should be such as the premium paid thereon would have purchased at the correct age. (R. p. 4.)

There was also a provision in the policy that, "This policy shall be incontestible after it has been in force, during the lifetime of the Insured, for a period of two years from the date of its issue, except for non-payment of premiums, fraud or misstatement of age." (R. p. 5.)

There was also a provision in the policy, "This Policy constitutes the entire agreement between the Company and the insured and the holder and owner hereof."

DEFENSE.

At the trial in the Municipal Court of the District of Columbia, the Company's defense was that the insured was not in sound health on the date of the policy. (R. p. 6.) At the trial the defendant Company offered in evidence testimony tending to prove such defense, which evidence was objected to by the plaintiff on the ground that no copy of the application had been attached to and delivery with the policy to the insured by the Company. The trial court rejected this offered evidence. No further evidence being offered by the defendant, judgment against the Company was thereupon entered for the plaintiff. (R. p. 2.)

On writ of error from the Court of Appeals of the District of Columbia, the ruling of the Municipal Court in excluding the offered evidence was assigned as error. (R. p. 7.) The judgment of the Municipal Court was affirmed by the Court of Appeals on January 25, 1932. (R. pp. 10-11-12.)

SPECIFICATION OF ERROR.

The petitioner specifies that the Court of Appeals erred in holding that the plaintiff Company was not permitted to prove that the insured was not in sound health on the date of the policy.

ARGUMENT.

The admissibility of testimony tending to prove that the insured was not in sound health on the date of the policy involves the proper construction and interpretation of an Act of Congress applicable to the District of Columbia *only*.

This policy sued upon having been made and delivered to the insured in the District of Columbia, where the insured

lived and died, and where all premiums due the Company were paid, is a District of Columbia contract and is governed by its laws.

National Union vs. Sawyer, 42 App. D. C. 475.
Orient Ins. Co. vs. Daggs, 172 U. S. 557.

Under the incontestable clause in the policy, the policy was in force from its date and voidable for two years upon any of the grounds reserved therein, but not thereafter, except for fraud.

Healy vs. Metropolitan Life Ins. Co., 37 App. D. C. 240-245.
Mutual Res. Fund Life Association vs. Austin, 142 Fed. 398.
Mutual Reserve Fund Life Asso. vs. Austin, 6 L. R. A. (N. S.) 1064, 73 C. C. A. 498, 142 Fed. 398.

The question whether the offered evidence should or should not have been admitted is determined by the interpretation to be placed upon Sec. 657 of the Code of Law of the District of Columbia (now Title 5, Sec. 183 of the Code of the District of Columbia, 1930 Ed.) which reads as follows:

"Sec. 657. Copy of Application to Be Delivered with Policy.—Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of any thing contained in, or omitted from, such application."

The respondent here claims that under this local statute the application and the policy taken together constitute the whole contract between the Company and the insured and the holder and owner thereof. This local statute is intended

to protect the insured in two ways, namely, first by having both the application and the policy before the insured, so that he may know his contract, and if it contains error, he may have same corrected before it becomes too late; and secondly that in case of litigation the insured may have the application before the court to prove such application and representations by way of estoppel or waiver to defeat some defense which the Company might otherwise make under the provisions of the policy. Suppose for example in the instant case the insured had stated in his application he had been suffering from some disease but the Company believing same not serious in its nature as increasing its risk, nevertheless issued the policy, he should be allowed under the statute to have this application before the court, so that the representations might defeat the defense of *not in sound health* because the Company would be estopped because of having waived its right to complain of such condition. Dunbar vs. Insurance Company, 72 Wis. 492, 40 N. W. Rep. 386.

The policy sued upon in this case contains a provision: "This Policy constitutes the entire agreement between the Company and the Insured and the holder and owner hereof." This is an attempt by the Company to make the policy alone the entire contract but the local statute makes the application and the policy the whole contract of insurance. The Company cannot do this.

National Union vs. Sawyer, 42 App. D. C. 475.
Morse vs. Brainard, 42 App. D. C. 448.

This local statute under consideration has been before our local courts and has been given a liberal interpretation to accomplish its purpose.

In Metropolitan Life Ins. Co. vs. Hawkins, 31 App. D. C. 493-489, the court had before it the construction of this local statute. In his application the insured stated that he was in sound health and had not been attended in any

hospital for the past two years, etc. The defense was that he had been treated in Emergency Hospital during the two years prior to the issuing of the policy to him. The court rejected the evidence because only a part and not all of the application had been delivered with the policy. The court said in part, "This question of materiality, however, is settled by the statute which requires a copy of the application, that is to say the entire application, that is made for the policy. It left no discretion on the insured to select such parts of the application as it may deem material for delivery with its policy. This conclusion renders it unnecessary to consider the question of the competency of the physician's testimony. The application being inadmissible as a ground of defense, there is no foundation for other evidence."

In Metropolitan Life Ins. Co. vs. Burch, 39 App. D. C. 398-405, the court had before it whether the statute applied to an application for the restoration or renewal of a policy after it had lapsed for non-payment of premiums. No copy of the renewal application had been attached to the policy. The court said:

> "The purpose of the provision is that the insured shall be furnished with a copy of the application, upon the representations in which the validity of the policy, and its binding force may be made to depend. The rule of public policy, defined, applies with equal force to an application which renews the original policy, and amounts to a new contract of insurance embracing the terms of the original, but dates from the time of the renewal. The effect of the new contract, evidenced by the terms of the original one and the renewal application, is dependent upon the truthfulness of the representations made in the renewal application."
>
> "The case of Holden vs. Metropolitan L. Ins. Co., 188 Mass. 212, 74 N. E. 337, relied on by the appellant, is not in point. *The statute therein construed is materially different* from Sec. 657."

It will be noted that in both of the cases immediately above quoted the defense was on something contained in the application or application for a renewal, the question of whether a defense may be made on the policy, where no copy of the application is attached to the policy had not been before the Court of Appeals until the present case and the court held no defense could be made.

FEDERAL COURTS.

The construction of the constitution and laws of a state by its courts is as a general rule, binding on Federal Courts.

> Forsythe vs. Hammond, 166 U. S. 509.
> Christy vs. Pridgeon, 71 U. S. 196.

This is particularly true as regards rules of evidence.

> Continental Life Ins. Co. vs. Union Trust Co., 112 U. S. 250.

STATE COURT DECISIONS.

The petitioner asks this court to reverse the Court of Appeals of the District of Columbia in its interpretation of this local statute, because the petitioner says certain state courts have made decisions under similar statutes which conflict with this decision of our Court of Appeals. Several state court decisions are cited in support of this contention and we shall now point out that while the statutes of the several states whose decisions are quoted by the petitioner are *somewhat similar they are essentially different*, from our local statute.

The Massachusetts statute provides:

> "Every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must be attached thereto a correct copy of the application and unless so attached, the same shall not be considered a part of the policy or received in evidence.

This statute of Massachusetts our Court of Appeals in Metropolitan L. Ins. Co. vs. Burch, *supra*, said was *materially different from our local statute.*

The Kentucky Statute provides:

> "Sec. 679. All policies or certificates hereafter issued to persons within the Commonwealth of Kentucky by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the by-laws, or the rules of the corporation, either as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, shall have each application, by-law and rules or the parts thereof relied upon as forming part of the policy or contract between the parties thereto, or as having any bearing on said contract, attached to the policy or certificate, or printed on the face or reverse side thereof, and unless either so attached and accompanying the policy, or printed on the face or reverse side thereof, shall not be received as evidence in any action for the recovery of benefits provided by the policy or certificate, and shall not be considered a part of the policy or of the contract between the parties."

The case of Western & Southern L. Ins. Co. vs. Weber, 183 Ky. 32, 209 S. W. 716, held that as the policy made no reference to the application it was not therefore a part of the contract of insurance. The court held that a provision in the policy itself to the effect that the policy should be void if the insured had before the date of the policy any disease of the brain permitted the Company to make defense on the ground of mental disease. In other words the policy was the entire contract between the parties and defense was made upon the very terms of the policy.

The Mississippi statute provides, Section 5174, Code 1930:

> "All life insurance companies doing business in the state of Mississippi shall deliver to the insured with

> the policy, certificate or contract of insurance in any form, a copy of the insured's application, and in default thereof, said life insurance company shall not be permitted in any court of the state to deny that any of the statements in said application are true."

Met. Life Ins. Co. vs. Scott, Admr., 160 Miss. 537, 545, is under that statute. There was no application attached to the policy and the court allowed a defense on a provision in the policy. The defense was not on any statement in the application, but the policy was treated as the entire contract between the parties.

The Pennsylvania Act of May 11, 1881 (P. L. 20), in Sec. 1 provides:

> "All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to the said policies, correct copies of the application as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between the parties."

In Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460, 12 Atl. 668, 673, the court said in construing this Pennsylvania statute:

> "The application was rightly excluded from the testimony. The provisions of the Act of 11th of May, 1881 (P. L. 20), are conclusive on this point. No copy of the application or the by-laws of the company was

attached to the policy as the Act requires. It constituted, therefore, no part of the policy, or of the contract between the parties, and was not receivable in evidence. The case is to be considered as if no such paper existed."

The other cases mentioned from Pennsylvania by the petitioner, namely, Panopoulos, Extr. v. Metropolitan Life Ins. Co., 96 Pa. Sup. Ct. 325, and Hood v. Prudential Insurance Co., 22 Pa. Sup. Ct. Rept. 244, held that defense could be made on provisions in the policy which was the entire contract between the parties, but not on any thing contained in the application not attached to the policy because by the Act the application was no part of the contract between the parties.

Washington statute:

Section 7075 Rem. Comp. Stat. provides:

"Every contract of insurance shall be construed according to the terms and conditions of the policy, except when the contract is made pursuant to a written application therefor, and such application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do, it shall not be made a part of the insurance contract."

Wisconsin statute, Section 1945a provides:

"All fire insurance corporations, except town insurance companies, shall upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representations of the assured; which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to herein, or which may in any manner effect the validity of such policy. The omission to do so shall not render the policy invalid; but if any corpora-

tion neglects to comply with the requirement of this section, it shall forever be precluded from pleading alleging, or proving such application, or representation, or any part thereof in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such corporation either to plead or prove such application or representations, *but may do so at his option.*" Lumbar vs. Ins. Co., 72 Wis. 492, 40 N. W. Rep. 386.

In Wilcox vs. Continental Ins. Co. of New York, 85 Wis. 193, 55 N. W. 188, in the policy itself there was a provision that the policy should be void, if there was any other insurance on the stallion insured or a chattel mortgage on him. There was apparently no written application for the insurance and the agent for the company did not ask about same. The court held that the company could prove the chattel trust and other insurance to defeat the suit on the policy. This is the case quoted by petitioner.

Iowa statute, provides:

"Section 1741. Copy of Application,—

"All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy or indorse thereon, a true copy of any application or representation of the assured which by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid; but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging or proving any such application or representations or any part thereof, or falsity thereof, or any part thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representations, *but may do so at his option.*"

In MacKinnon vs. Mutual Fire Ins. Co., 89 Iowa 170, 56 N. W. 423, cited by the petitioner the court was construing this Iowa statute and held that notwithstanding no copy of the application had been attached the provision in the policy to the effect that the policy should be void, if the ground on which it stood was less than a fee simple title in the insured, allowed the company to show by way of defense that the insured had less than a fee-simple title.

In Kirkpatrick v. London Guarantee & Accident Co., 139 Iowa 370, 115 N. W. 1107, 19 L. R. A. (N. S.) 102, cited by the petitioner the court was also construing this Iowa section. There was no application attached but the defense was on a provision contained in the policy itself and the court allowed the evidence to be received showing the policy void thereunder. The court in the opinion says as to this section, "The section of the code which we are now asked to interpret has frequently been considered by this Court, and has been liberally applied in excluding an insurance company from relying in any way upon representations or warranties contained in an application, a copy of which has not been incorporated into or attached to the policy; and the purpose of the statute has been declared in a general way to be the prevention of any representation or warranties in the application becoming considered a portion of the contract, or available to the company as a defense, unless a copy of the application is incorporated or attached." "An evident purpose of this statute is that, when the application is made a part of the contract—a true copy must be attached to the policy, so that the writing composing the contract may all appear together, and that the insured may be in possession of the evidence of which his contract is. Johnson v. Des Moines L. Inc. Co., 105 Iowa 273, 75 N. W. 101."

SUMMARY.

Under the several state statutes quoted above, the law is as follows:

(1)

In Massachusetts, Kentucky, Pennsylvania and Washington state, if the copy of the application is not attached same forms no part of the contract of insurance at all.

(2)

In Mississippi, if the copy of the application is not attached, the company is not permitted to deny any statements in the application to be true.

(3)

In Wisconsin and Iowa, if the application is not attached it is no part of the contract so far as the company is concerned and cannot be used in any way as a defense by the company, *but the insured may make use of it at his option.*

(4)

In the District of Columbia the statute says the insurance company "shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in or omitted from such application."

Mr. Justice Hitz in delivering the opinion of the Court of Appeals in this case said:

> "That policies of life insurance are issued upon applications containing applicant's version and representations as to those matters and things is common knowledge.

"To the end that he, his beneficiary, and if need be, the courts, might see exactly what he said in that connection, the statute provides that he, as well as the company, shall possess the entire contract. (Metropolitan Life Ins. Company v. Burch, 39 App. D. C. 405.)

"And to accomplish that purpose it provides that unless the company delivers with the policy a copy of the application, no defense shall be allowed to such policy on account of any thing contained in or omitted from the application.

"That the defense in this case is upon something contained in or omitted from the application, there can be no doubt."

The material difference between the statutes of the several states quoted and our local statute applicable to the District of Columbia only is this: The state statutes declare that if the application is not attached *it shall not be a part of the contract between the parties.* All of the quoted statutes provide that if a copy of the application is not attached the company may make no defense on any thing contained in the application; and only Wisconsin and Iowa allow the insured to make use of the statements in the application where the company has failed to attach a copy thereof to, and deliver it to the insured with the policy. The District of Columbia statute we claim makes the application and policy the whole contract between the parties and if the company fails to attach a copy of the application to and deliver it with the policy to the insured, in default thereof no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application. It may be that the statute would have been complete by stopping with a period after "such policy" and that "on account of anything contained in, or omitted from such application" was merely added by way of emphasis. This local statute is the only one found providing that if no copy of the application is attached no defense may be permitted on account of any thing *omitted from such application.*

Any defense that might be made to the policy would necessarily be upon something contained in or omitted from the application as was said by Mr. Justice Hitz delivering the opinion of the Court of Appeals in this case.

We respectfully submit that the decision of the Court of Appeals in this case should be affirmed.

W. Gwynn Gardiner,
George A. Maddox,
Attorneys for Respondent.